

COMMENTS OF THE GILA RIVER INDIAN COMMUNITY ON DEPARTMENT OF THE INTERIOR PROPOSED POLICY ON CONSULTATION WITH INDIAN TRIBES

July 14, 2011

The Gila River Indian Community (the Community) hereby submits comments on the Department of the Interior's proposed *Policy on Consultation with Indian Tribes*, dated May 11, 2011 (76 Fed. Reg. 28446). The Community is a Federally-recognized Indian Nation located south of Phoenix, Arizona, with reservation lands encompassing approximately 372,000 acres and approximately 21,000 enrolled members. The Community has regular government-to-government contact with the Department and its agencies, and is frequently impacted directly by Department actions and policies. For these reasons, the Community is well aware of how the Department and its agencies currently consult with tribes, and ways that the Department can improve its consultation process and policy.

1. Context for the Community's Comments

The Community's comments on the proposed Consultation Policy are based, in large part, on the circumstances surrounding the Navajo Generating Station (NGS), where the various agencies within the Department have overlapping jurisdiction and have taken conflicting positions, and one agency supports a position that could have grave consequences for the Community and other Arizona Tribes. Despite these circumstances, and interaction sought by the Community with the Office of the Assistant Secretary – Indian Affairs and the Office of the Commissioner – Bureau of Reclamation, we understand that no Department-wide position has been established for NGS and neither the Department nor any of its agencies have initiated formal consultation with the Community regarding NGS.

NGS is a coal-fired power plant located on the Navajo Indian Reservation. NGS is owned in part by the Bureau of Reclamation, and its power is used almost exclusively to pump Central Arizona Project water, a trust resource, to the Community and other Arizona tribes pursuant to Federal legislation that settled water rights claims against the United States. The Environmental Protection Agency (EPA) has initiated a rulemaking to determine the Best Available Retrofit Technology (BART) for NGS in an effort to reduce regional haze at the Grand Canyon, a National Park Service unit. Selection of an overly-stringent BART could adversely affect the economy and culture of the Community, the United States' trust responsibility to the Community, and rights that the Community specifically bargained for and was granted in Federal legislation in 2004.

Despite the fact that imposing an overly stringent standard could force NGS to close, deprive the Community of its rights to water provided under federal law and violate federal trust obligations to the Community, the National Park Service has supported a BART standard that would do just that. NPS' position flies in the face of the Bureau of Indian Affairs' mission to "enhance the quality of life, to promote economic opportunity, and to carry out the responsibility to protect and improve the trust assets of American Indians, Indian tribes, and Alaska Natives" and the

Bureau of Reclamation's obligations under federal law to ensure the delivery of affordable water to the Community and other tribes.

NPS has taken its position without any formal consultation with the Community or other affected tribes, and apparently, without regard for the positions of other agencies within the Department, and other effected Arizona Indian tribes. This circumstance – where an agency within the Department takes a policy position that could be disastrous to tribes without any consultation with those tribes and without Department-wide agreement or reconciliation on the policy position – demonstrates the absolute need for an improved consultation policy.¹ The Community acknowledges that matters like the NGS matter have inherent complexities that require considered and informed discussion. Indeed, the fact that a difference of opinion within the Department has emerged underscores, absent formal consultation, the need for improved consultation policies.

It is therefore against this backdrop that the Community submits its comments below on the Department's proposed Consultation Policy.

2. Consultation Policy Must Include a Process to Reconcile Differing Positions Within the Department

As the NGS situation makes clear, there is a significant need for the Department's Consultation Policy to address how the Department will establish a unified Department position as part of the consultation process. The Department is comprised of multiple agencies, each with potentially overlapping jurisdiction, especially when it relates to tribal resources and issues such as water rights. While the proposed Consultation Policy recognizes the need to "promote cooperation and participation between agencies with overlapping jurisdiction, special expertise, or related responsibilities regarding a Departmental Action with Tribal Implications," it lacks a mechanism for reconciling differing agency positions either as part of the consultation process or as a prerequisite to initiating consultation. Without a process for reconciling agency positions, Indian tribes are relegated to an inefficient process involving, at best, multiple consultations within the Department, the results of which could be inconclusive but inherently contradictory.

The lack of a process to reconcile agency positions within the Department also leaves the Department without single or well-vetted positions on issues for which the Department is supposed to have expertise, and about which the Department is expected to speak in a single voice. This imperative is both a matter of good government and current federal practice. . Within the Department, the need to reconcile conflicting positions in the legal context is recognized in the Departmental Manual (DM), which makes the Solicitor responsible for "formulating the legal policies of the Department and resolving any conflicts which may arise in the application of these policies." 109 DM 3, 3.2. Also in the legal context, where conflicting positions exist between sister Federal agencies, the Office of Legal Counsel within the Department of Justice is responsible for establishing a unified position for the United States.

¹ The Community recognizes that as the agency undertaking the rulemaking, the EPA must consult with the Community. On May 20, 2011, the Community sent a letter to EPA requesting consultation under EPA's new consultation policy.

Outside of the legal context, federal laws such as Section 7 of the Endangered Species Act, the Fish and Wildlife Coordination Act, and Section 106 of the National Historic Preservation Act, require agencies to reconcile, or at least address, conflicting positions through mandated consultation and coordination processes. Thus, mechanisms exist that the Department can look to as potential models to reconcile or address conflicting or diverging agency positions within the tribal consultation policy.

As the NGS circumstance has made clear, especially for the Community, there is a dire need for the Department to institute a process to reconcile conflicting agency positions either as part of tribal consultation or as a prerequisite to initiating consultation. If the Department will not require such reconciliation, the Consultation Policy should, at minimum, expressly require tribal consultation by each agency that is taking an action or policy position that could impact tribes. The Consultation Policy should also make clear that consultation by one Department agency with a tribe does not relieve other involved agencies within the Department of their obligation to consult.

3. Expand Definition of *Departmental Action with Policy Implications*

Consistent with the above, the definition of "*Departmental Action with Policy Implications*" should be revised to clarify that actions by bureaus and offices within the Department trigger the obligation to consult. This definition should also be revised to include Departmental "positions" in the list of actions that may have a substantial direct effect on Indian Tribes. (In the case of NGS, it is NPS' position in support of a stringent BART that could adversely affect tribes.) Finally, the Community recommends that actions or positions that threaten to violate trust obligations be added to the list of areas requiring consultation within the definition of "*Departmental Action with Policy Implications*."

To reflect the above, the Community proposes revising the definition of "*Departmental Action with Policy Implications*" as follows (**bold** represents new or moved text):

Departmental Action with Policy Implications—Any regulation, rulemaking, policy, guidance, legislative proposal, grant funding formula changes, **position**, or operational activity **by the Department, including a Bureau or Office within the Department**, that may have a substantial direct effect on an Indian Tribe, including but not limited to:

...

4. **Circumstances where the Federal trust obligation is implicated or may be violated.**

4. Continuing Obligation to Consult

Under *Section A, Initiating Consultation*, the Consultation Guidelines should include an obligation for the Department and agencies to undertake subsequent rounds of consultation as an action triggering consultation proceeds, is further developed or changed, or where new facts or issues arise that could impact the interests of tribes.

5. Involvement by Senior Leadership in Consultation

Under *Section B, Role of Tribal Governance Officer and Tribal Liaison Officer in Consultation Process*, the Consultation Policy should require participation by senior leadership in the Department or appropriate bureau or office where an action triggering consultation will severely impact tribes. Similarly, the Consultation Policy should require participation by senior leadership within the Department in cases where the positions of bureaus or offices have not been reconciled.